YEO BEE LIN

v.

LEE ENG CHEE

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S6-22-1281-2001]
16 DECEMBER 2003

FAMILY LAW: *Relations between husband and wife - Adultery - Whether wife could claim damages for loss of reputation and mental distress under s. 4A Married Women Act 1957 - Whether claim was sustainable in view of remedy provided under ss. 58 and 59 Law Reform (Marriage & Divorce) Act 1976 - Whether loss of reputation and mental distress within s. 4A of 1957 Act - Whether husband's subsequent suit for judicial separation was a ground for striking out wife's claim*

In this suit, the plaintiff wife brought a claim for damages against the defendant husband under s. 4A of the Married Women Act 1957 ('the 1957 Act') for loss of reputation and mental distress as a consequence of an alleged act of adultery committed by the defendant. The plaintiff alleged that the defendant inflicted severe injury on her by forcing her to listen to his sexual exploits with another woman in detail. The defendant applied to strike out this suit by the plaintiff under O. 18 r. 19 of the Rules of the High Court ('RHC'). He also filed a petition for judicial separation ('matrimonial suit') in respect of the marriage. Whilst the matrimonial suit was pending before the court, the defendant's application to strike out this suit by the plaintiff was dismissed by the senior assistant registrar. The defendant now appealed against the dismissal of his striking out application.

The issues were: (1) whether the plaintiff had a reasonable cause of action under the 1957 Act as a remedy was provided under ss. 58 and 59 of the Law Reform (Marriage & Divorce) Act 1976 ('the 1976 Act'); (2) whether loss of reputation and mental distress fell within the definition of 'personal injury' under s. 4A of the 1957 Act; and (3) whether the defendant's pending matrimonial suit constituted a ground for striking out this suit under O. 18 r. 19 RHC on multiplicity of proceedings.

Held:

[1] Section 4A of the 1957 Act should be given its plain meaning. It permitted the plaintiff to bring a civil suit against the defendant for injury suffered by her. Although the injury was a result of an adulterous act, the remedy provided under s. 4A of the 1957 Act did not run parallel to the remedy provided under ss. 58 and 59 of the 1976 Act. Section 4A of the 1957 Act was for damages against one's own spouse for personal injury whilst ss. 58 and 59 of the 1976 Act were against a third party for causing the break-up of the marriage. For deliberation into these, different considerations and legal principles applied. The only common factor between the two was that they related to a similar fact – the adulterous act. However, this alone did not justify the court to prohibit one claim from the other. They were separate and distinctive in nature. Further, in the matrimonial suit between the parties, there was no claim made against a co-respondent. (p 697 a-f)

[2] When reading 'personal injuries' and 'injuries to his or her person' under s. 4A of the 1957 Act, there is no distinction between that of a physical nature and that of a mental nature. To attempt to distinguish between the two is no longer relevant in the present day without an express proclamation in an enactment. (p 698 f)

[3] Since the cause of action in the matrimonial suit differed from this suit brought under s. 4 of the 1957 Act, the argument of multiplicity of proceedings had no ground and with it the justification to strike out this suit under O. 18 r. 19 RHC. However, in awarding the amount of damages under the 1957 Act, the court must bear in mind the amount of maintenance awarded in the matrimonial suit, if any. Therefore, it would be wise for this court to stay this proceeding until the outcome of the plaintiff's claim for maintenance. The plaintiff should not be prejudiced by such temporary suspension as her rights to pursue this cause of action were still preserved. (pp 699 f-h & 700 a-c)

[Appeal dismissed; stay of proceedings until disposal of matrimonial suit between parties relating to maintenance claim.]

Case(s) referred to:

Mcloughlin v. O'Brian [1983] 1 AC 410 ***(refd)***

Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(refd)***

Page v. Smith [1996] 1 AC 155 ***(refd)***

PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***

Wilkinson v. Downton [1897] 2 QB 57 ***(refd)***

Legislation referred to:
Law Reform (Divorce & Marriage) Act, s. 78
Married Women Act 1957, ss. 4A, 9(2)
Rules of the High Court 1980, O. 12 r. 7, O. 18 r. 19, O. 92 r. 4

For the plaintiff - Gobind Singh Deo; M/s Karpal Singh & Co
For the defendant - Foo Yet Ngo; M/s YN Foo & Partners

Reported by Usha Thiagarajah

JUDGMENT

James Foong J:

Introduction

The plaintiff in this action is the wife of the defendant. They have been married for almost 27 years, with two children, one of whom is already an adult.

Claiming that the defendant has committed adultery in 1996, the plaintiff is suing him for damages for lost of reputation and emotional distress suffered in consequence to this act of adultery. In her claim for exemplary damages the plaintiff, by way of particulars, alleges that one afternoon in 1996, the defendant inflicted severe injury on her by forcing her to listen to his sexual exploits with another woman in detail.

Committed to defend himself of this charge, the defendant entered a conditional appearance. Soon after, he applied to strike out the defendant's claim under O. 12 r. 7, and/or O. 18 r. 19, and/or O. 92 r. 4 of the Rules of High Court (RHC).

The senior assistant registrar dismissed this application when it first came up for hearing. Dissatisfied, the defendant appealed against this ruling. This appeal is now before me for consideration.

Aside from this suit, the defendant has filed, in the matrimonial section of the High Court at Kuala Lumpur, a petition for judicial separation in respect of this marriage. This case is pending adjudication. In the plaintiff's answer to the petition for judicial separation, this allegation of the defendant's adultery is raised.

Defendant's Contentions

The first contention of the defendant in his application to strike out the plaintiff's claim is that a wife cannot sue her husband under s. 4A Married Women Act 1957, for personal injuries suffered by her when it is in consequence to a disclosure of adultery. This is based on the premise that the plaintiff is already accorded with appropriate remedy against the corespondent under the provisions of the Law Reform (Marriage & Divorce) Act. In the alternative, the defendant agues that even if such a claim is allowed to be instituted, mental distress suffered by the plaintiff is not a "personal injury" under s. 4A Married Women Act. Finally, since the defendant has instituted divorce proceedings against the plaintiff in which the issue of adultery is raised, the defendant contends that there would be a multiplicity of actions if this case were also litigated.

Plaintiff's Reply

Disagreeing with the assertions of the defendant, the plaintiff demands restitution under s. 4A Married Women Act, which provides a statutory remedy to her to sue her husband for personal injury caused by him aside from other remedies set out in the Law Reform (Marriage & Divorce) Act. In furtherance, this statutory relief under s. 4A Married Women Act covers the kind of injury as suffered by her in the statement of claim. In reply to the defendant's last assertion, the plaintiff is of the view that matrimonial proceedings under the Law Reform (Marriage & Divorce) Act commands different legal considerations from that of an action brought under s. 4A Married Women Act. For this, the argument of multiplicity of actions should not arise.

Application Of Legal Principles

In an application of this nature, I reminded myself of the legal principles to be applied for consideration to avoid departure from such test frequently caused by over enthusiasm when encountering a novel factual situation which involves stimulating points of law, and the eagerness to provide an ultimate solution to the substantive dispute in the case.

Though three provisions of the RHC are effected by the defendant in this exercise, principally, for consideration of this application, it would be mainly confined to O. 18 r. 19 of the RHC which permits this court to strike out any pleadings on grounds that:

(a) it discloses no reasonable cause of action;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action;

(d) it is otherwise an abuse of the process of the court.

Issues

From the arguments presented three issues surfaced. First: whether the plaintiff has a reasonable cause of action under s. 4A Married Women Act based on the facts as alleged in the statement of claim keeping in mind that a remedy exist against the co-respondent under the Law Reform (Marriage & Divorce) Act. Second: whether loss of reputation and mental distress alleged to be suffered by the plaintiff are within the definition of personal injury as expressed in s. 4A Married Women Act. Third: whether there is a multiplicity of proceedings to constitute a ground to strike out this action under O. 18 r. 19 RHC.

Analysis

1st issue: whether the plaintiff has a reasonable cause of action under s. 4A Married Women Act on the facts as alleged by the plaintiff in her statement of claim keeping in mind that a remedy is provided by the Law Reform (Marriage & Divorce) Act against the co-respondent.

In order to consider this issue it is necessary to examine the historical aspect of this piece of legislation – s. 4A Married Women Act.

Before the Act came into force, Common Law did not provide for a married woman to sue nor be sued by her husband. *Vice versa* this legal position applied to the husband as well. The rationale behind this was that husband and wife were seen by the law as one person and:

> (the) legal being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover she performs everything ... Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and responsibilities, that either of them acquired by marriage." – Blackstone, Commentaries on the Laws of England (8th edition, 1824, volume 1 @ 449. Thus one spouse could not sue the other in tort.

In 1957 the restrictive doctrine of legal unity of husband and wife was relaxed following a change of approach in England. This was with the introduction of s. 9(2) of the Married Women Act which declares:

> A husband or a wife shall be entitled to sue each other in tort for the protection or security of his or her property, as the case may be.

But the proviso "for the protection or security of his or her property" was given a narrow interpretation by the Supreme Court in *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib* [1993] 1 CLJ 264. The facts of this case (besides those relating to the religious background of the parties) were

these: The wife plaintiff filed a civil claim against the defendant alleging that she was battered by her husband on numerous occasions. On this Harun Hashim SCJ pronounced that:

> The cause of action is clearly a tort. If the allegation of assault and battery can be proved, this may be the subject of criminal proceedings against the defendant but this fact stands independently from an action of tort. As the plaintiff and defendant are husband and wife and the allegation of assault and battery constituting the tort are not related to the protection or security of property, the plaintiff is barred by s. 9(2) of the Married Women Ordinance from suing the defendant. Section 9(2) therefore applies and the High Court is in error in deciding that it did not.

Expanding the scope of this remedy by a spouse against another, s. 9(2) of the Married Women Act was repealed on 8 July 1994. In its place, the new and current provision – s. 4A provides:

> **Capacity of husband and wife to sue each other for personal injuries.**
>
> A husband or a wife shall be entitled to sue each other in tort for damages in respect of injuries to his or her person, as the case may be, in the like manner as any other two separate individuals.

According to the late Professor Mimi Kamariah Majid (in her text *'Family Law in Malaysia'* at p. 47) "with the repeal of the sub-s. 9(2) (of the Married Women Act) and the introduction of the new s. 4A spouses may now sue each other not only for road accidents but also for injuries incurred in a fight or an assault."

But Ms Foo, counsel for the defendant, though conceding that s. 4A of the Married Women Act permits the plaintiff to bring a civil suit against the defendant for injury suffered by her, argues that when the injury is a result from the disclosure of an adulterous act of one's spouse, as described in this case, then this runs parallel to the remedy provided under s. 58 and 59 of the Law Reform (Marriage & Divorce) Act which allows the same injured spouse to sue the co-respondent for damages in respect, perhaps, of the same adulterous act. As such, Ms Foo agreed that s. 4A of the Married Women Act should not include claims arising from disclosure of adulterous affair. This, according to her is in line with the stand taken in many Commonwealth countries where claims for damages arising from the act of adultery is abolished based on the rational that one party should not place "another in a humiliating position and when proceedings (in matrimonial cases) are brought (for) they tend to create bitterness between the parties" – see UK Law Commission on Family Law (Cmmd No 25). But since claims against co-respondents are retained in our country, Ms Foo proposed that s. 4A Married Women Act should be given a narrow interpretation.

I am puzzled over these arguments. For a start there is no express provision in the laws of Malaysia to abolish a claim by an injured spouse for damages against a co-respondent involved in an adulterous act that broke up the marriage. Though other countries with similar legal background as ours have amended their laws to accommodate a more humane approach to matrimonial disputes but until legislature enacts similar change, this court is not possessed with powers to alter the present law. As rightly pointed out by Mr Gobind Singh Deo, counsel for the plaintiff, in interpreting a statutory provision, "where the words are plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or events unjust or immoral" – quoting from Suffian LP in *PP v. Sihabduin bin Haji Salleh & Anor.* [1981] CLJ 39; [1981] CLJ (Rep) 82.

On the question of parallel claims for damages under s. 4A Married Women Act and ss. 58 and 59 Law Reform (Marriage & Divorce) Act, I wish to highlight that reliefs provided under these provisions arise out of different causes of action involving different defendants. One is for damages against one's own spouse for personal injury caused while the other is against a third party for causing the break up of the marriage. For deliberation into these, different considerations and legal principles apply. The only common factor between the two is the similar fact – the adulterous act. But this alone does not justify this court from prohibiting one claim from the other. They are, in my view, separate and of distinctive in nature. There is no legal basis to prohibit or restrain the application of both causes of action based on the similar backdrop. Incidentally, for the matrimonial proceedings brought by the defendant for judicial separation there is no claim made against any co-respondent. And even if there is, for reasons stated above it does not affect this personal injury claim by the wife against the husband.

Second Issue: whether loss of reputation and mental distress are within the definition of personal injury expressed in s. 4A Married Women Act.

Since Ms Foo did not make an issue of whether loss of reputation can form part of personal injury, I will not, at this stage of the proceedings, consider such a proposition. Perhaps, arguments on this factor may be taken up subsequently at the trial of the substantive matter.

With regard to whether personal injuries excludes mental distress, I wish to point out that the common law has since 1897 in the case of *Wilkinson v. Downton* [1897] 2 QB 57 recognized shock to the nervous system as part of personal injury and thus constitutes a good cause of action. In this case, the defendant, by way of a practical joke, falsely represented to the plaintiff, a

married woman, that her husband had met with a serious accident whereby both his legs were broken. The plaintiff believed it to be true and in consequence suffered a violent nervous shock which rendered her ill.

In the more recent English authority of *Mclaughlin v. O'Brian* [1983] 1 AC 410 @ 433 Lord Bridge declares:

> No judge who has spent any length of time trying personal injuries claims in recent years would doubt that physical injuries can give rise not only to organic but also psychiatric disorders. The sufferings of the patient from the latter are no less real and frequent no less painful and disabling than from the former. Likewise, I would suppose that the legal profession well understand that an acute emotional trauma, like the physical trauma, can well cause a psychiatric illness in a wide range of circumstances and in a wide range of individuals whom it would be wrong to regard as having any abnormal psychological make-up.

And in *Page v. Smith* [1996] 1 AC 155 @ 188, Lord Lloyd went further to state:

> In an age when medical knowledge is expanding fast and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded.

Thus, presently when one talks of personal injuries it is commonly accepted to incorporate both the physical and the mental kind. Similarly when reading 'personal injuries' and 'injuries to his or her person' in s. 4A Married Women Act there can be no distinction between that of a physical nature and the mental variety; both are within this definition. I am of the opinion that to attempt to distinguish between the two is no longer relevant in the present day without an express proclamation in an enactment, which in this case is absent.

With this, I hold that for the second issue, the answer must be in the positive.

Third issue: Whether there is a multiplicity of proceedings to constitute a ground to strike out this action under O. 18 r. 19 RHC.

This question is much related to Ms Foo's proposition concerning the claim for damages resulting from adultery where the plaintiff can sue either the defendant and/or the co-respondent. Her view is that since the aggrieved spouse can claim damages from the co-respondent, then there will be a multiplicity of action. Secondly, besides the claim for damages against the co-respondent, the plaintiff is also entitled to request for alimony. In assessing maintenance, Ms

Foo pointed out that the alleged infidelity of the defendant would be a factor to be taken into account by the judge hearing the matrimonial suit. This again would constitute a multiplicity of action between the parties.

On the issue of a claim against the co-respondent, which in this case does not arise since, as disclosed, there is none. Nevertheless, even if there is, for reasons put forth by me earlier, the issue of multiplicity has no justification. Repeating, it is for reason that these are different causes of action involving different parties. However, in respect of the quantum of damages to be awarded against the co-respondent (if there was one) if the act of adultery is proved, then damages given to the plaintiff in a claim under s. 4A of the Married Women Act may have some bearing when assessing the amount to be awarded. In any event, this issue does not arise since, as informed, the plaintiff in this case did not bring into the matrimonial suit any co-respondent.

But in respect of Ms Foo's second contention relating to assessment of maintenance to be paid to a wife in the matrimonial proceedings, I find much force in her argument. Currently, under s. 78 Law Reform (Divorce & Marriage) Act, in determining the amount of maintenance to be paid by one spouse to the other, aside from other factors mentioned in this provision, regard must be made "to the degree of responsibility which the court apportions to each party for the breakdown of the marriage". Obviously, the judge hearing the matrimonial suit would consider the allegation of adultery against the defendant, and if the defendant was found to be responsible for causing the break-up of the marriage by his liaison intrigue, then maintenance would be apportioned according to the degree of responsibility. This is no longer confined to the subject matter of quantum but is extended to involve the issue of liability. The latter revolving around whether the adultery did occur and the former to – the degree of the extra marital relationship contributed to the break-up of the marriage. However, one must not forget that the cause of action in the matrimonial suit differs from that brought under s. 4 Married Women Act. As stated earlier, the former is for maintenance under the Law Reform (Divorce & Marriage) Act where the wrongful act is a contributing factor. The other is for personal injuries under s. 4A Married Women Act caused by the alleged deliberate and intentional act of the defendant in disclosing and forcing the plaintiff to receive the hurtful and unpleasant description of the act of adultery that resulted in her injuries. Though both actions are fuelled by the same adulterous act they nevertheless continue to be separate causes of action. Applying this view, the argument of multiplicity has no ground and with it the justification to strike out this suit under O. 18 r. 19 RHC.

But I must confess that, once again, in awarding the amount of damages for the wrongful act under s. 4A Married Women Act, the court must bear in mind the amount of maintenance in the matrimonial suit awarded (if any) particularly when it is associated with a finding on the degree of the defendant's responsibility for the breakup of the marriage as a result of the alleged adulterous act being a contributing factor. When encountering such prospect then it is wise for this court to order a stay of this proceedings under the inherent powers of this court until the outcome of the petition for judicial separation is heard and disposed off, especially on the claim for maintenance by the plaintiff. I do not find the plaintiff prejudiced by such temporary suspension of this proceedings since her rights to pursue this cause of action is still preserved.

Conclusion

Accordingly, I hereby dismissed this appeal with cost. The decision of the learned senior assistant registrar is maintained but there shall be a stay of proceedings until the disposal of the matrimonial case between the parties relating to the plaintiff's claim for maintenance therein.